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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 08 2005

EAC 03 161 50136

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The record of proceeding, as it now stands, does not contain sufficient evidence to warrant approval of the petition. At the same time, however, the director's decision is too flawed to be upheld in its current configuration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks employment as a co-publisher and co-editor of *Attawassul News*, an Arabic-language newspaper published in New York. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

8 C.F.R. § 204.5(k)(2) defines "advanced degree" as any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. In this instance, the petitioner received his bachelor's degree only a few months before the petition's May 1, 2003 filing date. Therefore, the director concluded, the petitioner does not qualify as a member of the professions holding an advanced degree. The director, in denying the petition, "a National Interest Waiver requires an advanced degree or a Bachelors degree plus five years progressive experience."

The director is correct insofar as the petitioner did not qualify as an advanced degree professional as of the petition's filing date. Indeed, counsel acknowledged as much in a February 21, 2005 letter. The director erred, however, in stating that the national interest waiver is available only to advanced degree professionals. Aliens of exceptional ability may also request the waiver, and the director failed to consider whether the petitioner qualifies as an alien of exceptional ability. (The director had requested information regarding this classification, but the subsequent denial notice does not address the issue at all.)

8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as a degree of expertise significantly above that ordinarily encountered in the particular field of endeavor. To qualify as an alien of exceptional ability, an alien must satisfy at least three of six criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii). 8 C.F.R. § 204.5(k)(3)(iii) states that, if these six criteria do not readily apply to the alien's occupation, the petitioner may submit comparable evidence to establish the alien's eligibility. Counsel has contended that the standards at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to the petitioner, because the petitioner is an "entrepreneur" rather than a worker in a "specialized" field. Prior to issuing a new decision, the director must offer the petitioner the opportunity to explain, in detail, why the nature of the petitioner's work makes it impossible for him to satisfy at least three of the six criteria. The petitioner must also provide comparable evidence to show that the petitioner has a degree of expertise significantly above that ordinarily encountered in the field of newspaper publishing. The "expertise" mentioned here must be expertise in, or directly relevant to, newspaper publishing. It cannot suffice for the petitioner to argue, for instance, that the petitioner is a law student, and therefore he has more expertise in the law than most publishers. If the petitioner intends to argue that his work as an "entrepreneur" includes, but is broader than, newspaper publishing, then it is his burden to provide some kind of concrete description of what he intends to do in the United States. It cannot suffice simply to claim that the petitioner is an exceptional entrepreneur and will, therefore, excel at whatever venture he decides to undertake.

From the issue of the underlying immigrant classification, we turn to the national interest waiver. Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

In discussing the first prong of the national interest test set forth in *Matter of New York State Dept. of Transportation*, the director stated: "The beneficiary is a second year law student at Fordham University. The beneficiary's field of endeavor is of substantial intrinsic merit." The record, as a whole, does not clearly identify the petitioner's prospective field of endeavor. While the petitioner is a law student, the petitioner's arguments revolve around his involvement as a newspaper editor and publisher. Furthermore, we note that the petitioner must be eligible for the benefit sought as of the petition's filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). *See also* 8 C.F.R. § 103.2(b)(12), which states that the response to a request for evidence must establish eligibility as of the petition's filing date. In this instance, the petitioner was not even notified of his acceptance into law school until more than a month after the petition's filing date. If the petitioner desires that the director take into account the petitioner's legal education, and his activities while studying law, then the proper course of action would be for him to file a new petition with a later filing date that would permit consideration of that information.

The petitioner has asserted that his newspaper serves the national interest by serving as a voice of moderation within the Arab community in New York. The director, in discussing this newspaper, described the newspaper but did not explain why these attributes disqualified, or failed to qualify, the petitioner for a waiver. A discussion of "citations" appears to be more germane to the work of scientific researchers than to newspaper publishers.

The petitioner contends that that moderate Arab voices must be heard, and this point is well taken, but it does not follow that publishing a moderate Arabic newspaper automatically qualifies the publisher/editor for a national interest waiver. The director should afford the petitioner the opportunity to demonstrate that his newspaper has shaped the debate about Arab-Western relations, and the role of Arabs in American society, beyond the local level. General arguments about the importance of the media or specialty publications cannot suffice, because Congress has established no blanket waiver for publishers or editors of such publications.

The director's notice of decision contains several valid points, but as a whole, the flaws in that decision prevent us from upholding that decision. The director must issue a new request for evidence, followed by a new decision that more fully takes into account the facts of the petition.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, regardless of the outcome, is to be certified to the Administrative Appeals Office for review.